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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 188

W. J. DILLNER TRANSFER COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment, entered on April 26, 1961, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325, dismissing an action brought to set aside a report and orders of the Interstate Commerce Commission. Appellant Dillner is a common carrier by motor vehicle

of "heavy machinery and such commodities which because of their weight and size require special equipment." In a proceeding to determine the scope of Dillner's authorized operations, the Commission held, after full administrative proceedings, that the carrier was not entitled to transport certain bundled or aggregated articles of iron and steel and palletized firebrick.

The Commission noted that the commodities transported by Dillner consisted of (1) certain articles of steel and iron each individual piece of which is of such size and weight that it cannot be loaded manually but requires the use of a crane or other special device (called "Group 1" commodities) and (2) certain articles of iron and steel and firebrick each individual piece of which could be manually loaded without special equipment but which are tendered to the carrier in bundles or packages or on pallets in such quantity and aggregate weight as to require the use of special loading equipment ("Group 2" commodities). All of the commodities in both groups are loaded and unloaded with cranes or other special devices furnished and operated by the shippers and receivers at their own expense (J.S. 63); the over-the-road movement of these commodities is provided by Dillner in "ordinary flat-bed vehicles" commonly used for the transportation of general commodities and involving the use of no special equipment.[1]

[1] If any item "requires" special equipment and service and hence is authorized to be transported as a heavy commodity, the Commission has held that it is immaterial whether such special equipment or service is provided by the heavy-hauler or by the shipper or receiver. *National Automobile Transporters Assn.* v. *Rowe Transfer*, 64 M.C.C. 229.

Noting that the traditional indicium of heavy-hauling has been a holding out to transport articles that because of their size, shape, weight or other considerations require special equipment for either loading, unloading or hauling, the Commission concluded that in construing such operating authority "the commodity itself is the controlling consideration" (J.S. 56), notwithstanding the fact that bundling or aggregating may be more efficient or economical and may result in a total bundle requiring special handling equipment. "Otherwise," the Commission said (J.S. 56), "there would hardly be any end to which the practice of aggregation might permit the heavy hauler to invade the general-commodity field, contrary to the public interest and contrary to the clear purport of its operating authority."

Applying these standards to the commodities being transported by Dillner, the Commission held (J.S. 64) that firebrick and certain enumerated iron and steel items did not by their inherent nature require bundling or aggregation. The Commission held, however, that certain steel sheets and plates falling within Group 2, insofar as their size and weight were concerned, required aggregation for shipping, because they were individually fragile and unstable, "so that the bundle actually constituted the commodity itself" (J.S. 62). Transportation by Dillner of all of the Group 1 commodities was held to be within its operating authority (J.S. 64). With respect to the Group 2 items, the Commission held that only steel sheets and plates, which required bundling in order to afford safe transportation, fell within the scope of Dillner's certificate;

transportation of the other items, aggregated for purposes of efficiency and economy only, was found not to be authorized by the certificate (J.S. 62, 64). The Commission accordingly ordered Dillner to cease and desist from the operations found to be unlawful (J.S. 5-6).

Applications for reconsideration were denied by the full Commission (J.S. 76-85) and on April 26, 1961, the three-judge district court unanimously sustained the Commission's report and orders (J.S. 14-25).

ARGUMENT

As the district court noted (J.S. 19), this case involves "the simple question [of] what is meant by the phrase, 'such commodities as because of their weight and size require special equipment.'" After extensive administrative proceedings,[2] the Commission concluded that the right of a heavy-hauler to transport such commodities did not embrace the transportation of certain bundled articles of iron and steel and palletized firebrick, the inherent nature of which did not require aggregation for the protection of the several

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[2] Appellants' contentions (J.S. 2) that these proceedings were conducted in violation of various provisions of the Administrative Procedure Act (5 U.S.C. 1001, *et seq.*) are without merit. There is nothing in Section 6(a) of the Act (5 U.S.C. 1005(a)) that precludes a Commissioner who did not hear oral argument from participating in a final decision of the agency. See *Quon Quon Poy* v. *Johnson*, 273 U.S. 352, 357; *Eastland Co.* v. *Federal Communications Commission*, 92 F. 2d 467, 470, certiorari denied, 302 U.S. 735. Nor is any burden of proof question presented by this case. There was no real dispute as to the evidence, most of which was entered by stipulation, and the only question was whether the Commission's construction was a reasonable one, supported by "reliable, probative, and substantial evidence." See 5 U.S. 1006(c).

items. It is axiomatic that the interpretation of a certificate issued by the Commission is primarily a question for the agency (*Service Transfer Co.* v. *Virginia*, 359 U.S. 171) and will be sustained "unless clearly erroneous" (*Nelson, Inc.* v. *United States*, 355 U.S. 554, 558). The district court held that the challenged orders of the Commission were not shown to be clearly erroneous or to be lacking in substantial evidentiary support (J.S. 24). We submit that this decision is correct and that the present appeal presents no real or substantial question calling for further review by this Court.

1. The Interstate Commerce Commission has long certificated a class of specialized motor common carriers, familiarly known as "heavy haulers," who are authorized to carry commodities that require the employment of special loading or hauling equipment. See *Classification of Motor Carriers of Property*, 2 M.C.C. 703, 710. The Commission has traditionally looked to the size and weight of the individual unit of the commodity sought to be transported in determining whether its loading, unloading, or road transportation requires the use of special equipment (J.S. 46). The only departure from this rule has been with respect to articles whose nature or composition precludes individual handling. The heavy haulers have been permitted to transport such goods where the bundles required for their protection are too large or heavy to be transported without special equipment. *Black—Investigation of Operations*, 64 M.C.C. 443, 446, 447.

In construing Dillner's certificate, the Commission did no more than to view the articles that Dillner

claimed to have a right to handle in the light of these established principles. Thus, single-unit iron and steel items that could not be loaded and unloaded manually, but required special hoisting equipment, were held to be within the scope of the carrier's operating authority. On the other hand, iron and steel items that were sufficiently small and light, as well as strong enough, to permit manual loading and unloading were held to be beyond the scope of the certificate, irrespective of whether the bundles in which they were packaged for purposes of efficiency and economy were of such weight and size as to require special devices (J.S. 64).[3] The district court concluded that "[t]he Commission's test is a reasonable test" (J.S. 22). It thought that the case of palletized firebrick presented "a difficult question" that "demanded careful scrutiny by the Court" (J.S. 21), but decided (*ibid.*) that the Commission's findings (J.S. 64) that firebrick could be hauled unpalletized and that "[n]either custom, usage, nor modern loading and shipping practices" brought the commodity within the ambit of the heavy hauler were "properly supported" by the record (J.S. 22). In short, the district court agreed with the Commission that to per-

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[3] The hearing examiner had concluded, contrary to the Commission, that Dillner ought to be permitted to transport aggregate loads of steel and firebrick even though such aggregation was merely a matter of convenience. But, as the district court pointed out (J.S. 23), the Commission was not bound by the recommendations of its examiner and "the difference here did not go to the credibility of witnesses in a situation in which the examiner's opinion ought to be given considerable weight but rather [to the] interpretation and meaning of terms," a matter "for the Commission rather than for the Examiner in the final instance." See also *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 496.

mit the mere act of aggregation to control the scope of the carrier's authority could well have extended the heavy hauler's certificate to cover the hauling of practically all commodities (*ibid.*).[4]

2. Appellants also appear to contend (J.S. 3, 11) that the district court erred in holding that the Commission was under no obligation to consider Dillner's alleged "grandfather operations" pursuant to which it secured its certificate as a carrier of commodities requiring special equipment for their loading, unloading or transportation. But the court was clearly correct in concluding that, in the absence of any showing by the carrier that it had in fact transported the questioned articles during the critical period for securing grandfather rights, the Commission was not required to pursue the matter (J.S. 24). Moreover, as this Court held in *Nelson, Inc.* v. *United States*, 355 U.S. 554, 561-62:

> [I]n the event the grandfather permit does not correctly reflect the scope of the grandfather operation, the carrier's recourse is to petition the Commission to reopen the grandfather proceedings * * * Such a contention is no answer to the present charge of permit violation, since the

[4] The Commission's action in this case in no way interferes with the "right and privilege" (J.S. 3) of the shipping public to determine the manner and form in which commodities shall be prepared for shipment by motor carriers. It merely prohibits a motor carrier of heavy commodities from expanding its operating rights at the expense of general-commodity carriers by means of aggregated shipments. If a shipper wishes to ship goods not requiring aggregation in bundles or on pallets, he may do so but must use the general-commodity carrier.

permit cannot be collaterally attacked [citations omitted]. To hold otherwise would render meaningless the congressional requirement of a permit to continue grandfather operations subsequent to the Act.

CONCLUSION

The appeal presents no substantial question warranting further review, and the judgment of the district court should be affirmed.

Respectfully submitted,

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AUGUST, 1961.

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